PREME COURT, U. S.

DEC 13 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 833

WILLIAM M. LOKER, JR., *Petitioner*,

v.

STATE OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

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INDEX

Page

Opinions below 1

Jurisdiction 2

Questions presented 2

Constitutional provisions involved 3

Statement 4

How the Federal question was raised 8

Reasons for granting the writ 13

Conclusion 17

Appendix—Opinions below 1a

AUTHORITIES

CASES:

Ballard v. *United States*, 329 U.S. 187 17
Bryant v. *Zimmerman*, 278 U.S. 63 14
Cassell v. *Texas*, 339 U.S. 282 ..... 15, 16, 17
Eubanks v. *Louisiana*, 356 U.S. 584 15
Hernandez v. *Texas*, 347 U.S. 475 15
King v. *State*, 190 Md. 361, 58 A. 2d 663 16
Reece v. *Georgia*, 350 U.S. 85 15
Schowgurow v. *State*, 240 Md. 121, 213 A. 2d 475 2, 3, 4, 5, 6, 13, 14, 15, 16, 17
State v. *Madison*, 240 Md. 265, 213 A. 2d 880 ....6, 14, 17
Thiel v. *Southern Pacific Co.*, 328 U.S. 217 17
Torcaso v. *Watkins*, 367 U.S. 488 ..... 2, 3, 5

CONSTITUTIONAL PROVISIONS:

Constitution of the United States:

First Amendment 3

Fourteenth Amendment 2, 3, 4, 6, 13, 14, 16

Constitution of Maryland:

Declaration of Rights, Art. 36 ..... 2, 3, 4, 6, 13, 17

Declaration of Rights, Art. 37 ..... 2, 3, 5

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v.

STATE OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

WILLIAM M. LOKER, JR., your petitioner, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland, entered in the above-entitled case on September 27, 1968.

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland (set forth in part at pp. 8-10, below) is reported at 2 Md. App. 1 and 233 A. 2d 342. The opinion of the Court of Appeals of Maryland (Appendix, *infra*, pp. 1a-13a) is reported at 245 A.2d 814.

JURISDICTION

The opinion of the Court of Appeals of Maryland was filed on September 27, 1968. A timely motion for reargument was denied on November 5, 1968. Under Maryland practice there is no formal judgment, only a mandate; and in the present case the mandate was stayed for 90 days from September 27, 1968, to permit the filing of the present petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Following the invalidation in *Torcaso* v. *Watkins,* 367 U.S. 488, of Article 37 of the Declaration of Rights of the Maryland Constitution, which required "a declaration of belief in the existence of God" as a prerequisite to holding public office, the Maryland Court of Appeals in *Schowgurow* v. *State,* 240 Md. 121, 213 A. 2d 475, held invalid, as violative of the Fourteenth Amendment, Article 36 of the Declaration of Rights of the Maryland Constitution, which required as a prerequisite to the competency of a juror that "he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come."

A grand jury had been empaneled from a jury panel selected prior to the *Schowgurow* decision. Thereafter the trial court judges entered an order discharging the grand jury, reciting that it was "illegally constituted because the procedure used in the selection and qualifying of said Grand Jury was substantially the same as found to be illegal in the above-mentioned Schowgurow case." Subsequently another grand jury was selected from the remaining members of the original panel, and it was this second grand jury that indicted petitioner.

The question presented is whether the indictment thus returned can, consistently with the Fourteenth Amendment, sustain petitioner's conviction thereon.

CONSTITUTIONAL PROVISIONS INVOLVED

I. Constitution of the United States

The provisions of the First and Fourteenth Amendments are sufficiently familiar so that they do not require quotation.

II. Constitution of Maryland

1. The provision of the Maryland Declaration of Rights that was held in *Torcaso* v. *Watkins*, 367 U.S. 488, to violate the Fourteenth Amendment reads as follows:

> **"Article 37. Religious tests as qualification for office; oath of office.**
>
> "That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution."

2. The provision of the Maryland Declaration of Rights that was held in *Schowgurow* v. *State*, 240 Md. 121, 213 A. 2d 475, to violate the Fourteenth Amendment, reads as follows:

> **"Article 36. Religious freedom.**
>
> "That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on account of his religious persuasion, or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain,

any place of worship, or any ministry; nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come."

STATEMENT

The recital that follows will be restricted to the facts bearing on the Federal question raised by the present petition.

On September 2, 1965, a 150-name jury panel was selected by the Circuit Court for St. Mary's County, Maryland, pursuant to the Constitution of that State and the general and local laws applicable to St. Mary's County. The contention made below, that the method of selection was not in conformity with the Maryland statutes, involved no Federal question and is no longer in issue.

At that time, Article 36 of the Declaration of Rights of the Maryland Constitution (*supra*, pp. 3-4) provided as a prerequisite for the qualification of a juror that "he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come."

On September 7, 1965, a grand jury was drawn from the foregoing panel, and that grand jury was empaneled (i.e., sworn) on September 20, 1965.

Thereafter, on October 11, 1965, the Maryland Court of Appeals held in *Schowgurow* v. *State*, 240 Md. 121, 213 A. 2d 475, that the provisions of Article 36, just quoted, were invalid under the Fourteenth Amendment of the Constitution of the United States, this in reliance on this Court's

decision in *Torcaso* v. *Watkins*, 367 U.S. 488, which had similarly held invalid the requirement in Article 37 of the Maryland Declaration of Rights of a like belief as a prerequisite to the holding of public office.

In consequence of the *Schowgurow* case, the judges for the Seventh Judicial Circuit, in which St. Mary's County is included, ordered that the grand jury empaneled for that county on September 20, 1965, be discharged. Their order, entered on the minutes of the court and signed by all the judges except one (who was absent), read as follows:

"IN THE CIRCUIT COURT FOR ST. MARY'S COUNTY, MARYLAND

"In Re: GRAND JURY for
SEPTEMBER TERM 1965

"ORDER OF COURT

"This Court having been made aware of the decision of the Court of Appeals of Maryland in the case of Lidge Schowgurow v. State of Maryland, No. 368, September Term 1964, filed on October 11, 1965, and it being obvious to the Court that the Grand Jury empaneled on September 20, 1965 is illegally constituted because the procedure used in the selection and qualifying of said Grand Jury was substantially the same as found to be illegal in the above mentioned Schowgurow case. It is therefore this 15th day of October, 1965,

ORDERED, by the Circuit Court for St. Mary's County, Maryland, that the Grand Jury empaneled on September 20, 1965, for the September Term 1965, is hereby declared to be illegally constituted and the members constituting the said Grand Jury being disqualified are hereby discharged. It is further

ORDERED, that a new Grand Jury be empaneled, selected in accordance with the provisions of Article 51 of the Annotated Code of Maryland (1964 replacement volume) as amended by Chapter 849 of the Acts

of the General Assembly, Maryland 1965 Session, as well as any other public general or public local laws applicable thereto.

/s/ J. Dudley Digges
J. Dudley Digges, C. J.

/s/ Philip H. Dorsey, Jr.
Philip H. Dorsey, Jr., A. J.

/s/ Roscoe H. Parker,
Roscoe H. Parker, A. J.

/s/ Ernest A. Loveless, Jr.,
Ernest A. Loveless, Jr., A. J.

/s/ Wm. B. Bowie
William B. Bowie, A. J.

/s/ Perry G. Bowen, Jr.
Perry G. Bowen, Jr., A. J.

.....
Robert B. Mathias, A. J.

/s/ Samuel W. H. Meloy
Samuel W. H. Meloy, A. J."

The original grand jury was in consequence dismissed on October 21, 1965.

Also on October 21, 1965, the Maryland Court of Appeals held in *State* v. *Madison,* 240 Md. 265, 213 A. 2d 880, that a believer had a right under the Constitution of the United States to a grand jury selected free from the restrictions of Article 36 of the Declaration of Rights, and that holding was articulated in an opinion filed on November 5, 1965.

On October 22, 1965, a second grand jury was empaneled from among the remaining members of the same jury panel that the Circuit Judges had held invalidly constituted under the *Schowgurow* case.

This second grand jury, on November 4, 1965, handed down a four count indictment against petitioner.

At the hearing on petitioner's motion to dismiss that indictment, on the ground, among others, that the grand jury had been improperly selected, Circuit Judge Dorsey, the resident judge for St. Mary's County, testified:

> "Q. And now, at the time you selected the panel in 1965, were you of the belief that [no] one was eligible to serve as jurors unless he believed in moral accountability for his conduct?
>
> "A. Naturally, that being the State Constitution at the time I was of that belief, but in selecting the 150 names, that question was never asked of anyone.
>
> "Q. Did you have reference to it in your picking of these names?
>
> "A. Since I have been judge, I have never known of anyone *who's* name was suggested for the jury, being a non-believer, nor has it ever been mentioned so far as I can recall."

Judge Dorsey in his testimony made no mention of the order, set out above, signed by himself and by six other judges, that had dismissed the original grand jury as "illegally constituted because the procedure used in the selection and qualifying of said Grand Jury was substantially the same as found to be illegal in the above mentioned Schowgurow case."

The motion to dismiss was denied, and, in due course, petitioner was convicted on two of the four counts. Thereafter the Maryland Special Court of Appeals, the intermediate appellate court in that State, affirmed; the Maryland Court of Appeals, the court of last resort, granted a petition for certiorari and likewise affirmed; and then denied a motion for reargument.

Petitioner now seeks in this Court review of his contention that the grand jury which indicted him was selected in violation of the Fourteenth Amendment to the Constitution of the United States.

HOW THE FEDERAL QUESTION WAS RAISED

1. Petitioner's Motion to Dismiss Indictment, filed in the Circuit Court for St. Mary's County, Maryland, alleged in part:

> "1. The Grand Jury which handed down said indictment was improperly, unlawfully and unconstitutionally selected, drawn, and impaneled."

2. The opinion of the Court of Special Appeals of Maryland included the following relative to the foregoing (2 Md. App. 1, 6-8, 233 A.2d 342, 346-347):

> "The legal basis for the contention that the Grand Jury was selected and empaneled unconstitutionally is predicated upon the decisions of the Court of Appeals in *Schowgurow* v. *State,* 240 Md. 121, decided October 11, 1965 and *State* v. *Madison,* 240 Md. 265. In *Schowgurow,* at page 131 the Court held that, under the decision of the Supreme Court in *Torcaso* v. *Watkins,* 367 U.S. 488, the provisions of the Maryland Constitution requiring demonstration of belief in God as qualification for service as a grand or petit juror were in violation of the Fourteenth Amendment to the federal constitution, and that any requirement of an oath as to such belief, or inquiry of prospective jurors, oral or written, as to whether they believe in a Supreme Being, was unconstitutional. The Court said, page 126:
>
> > 'Because of the requirement of the Maryland Constitution,[1] it has been the duty of nisi prius judges to make belief in God a condition to service as a juror. There is a strong presumption that judges and court clerks, like other public officers, properly perform their duties. [Citations omitted.]

---

[1] Article 36 of the Maryland Declaration of Rights provides, *inter alia,* that no person otherwise competent shall be deemed incompetent as a juror on account of his religious belief, "provided he believes in the existence of God, and that under his dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come."

> * * * Moreover this Court takes judicial notice of the fact that it is and for many years has been a widespread practice in this State, not only for grand and petit jurors to be questioned as to their belief in God as part of their oath, but also for prospective jurors to be so questioned, orally or in written interrogations, before their names are placed on the jury lists, and that any person who does not state his belief in God is excluded.'

It pointed out that the exclusion of non-believers was not only authorized but demanded by the Maryland Constitution and that the resulting danger of abuse obviates any need to show individual prejudice.

"The factual basis for the contention was that evidence produced at the hearing showed that from a list of 150 persons selected by the Honorable Philip H. Dorsey, Jr., Associate Judge of the Circuit Court of the Seventh Judicial Circuit of Maryland, prior to September 2, 1965, 23 persons were selected as the Grand Jury for the September term, 1965 and 25 persons as the petit jury panel. After the decision in *Schowgurow,* the Grand Jury so selected was discharged. From the 102 persons remaining on the original list a new Grand Jury was selected. It was this latter Grand Jury that returned the indictment against the appellant on November 4, 1965. The appellant argues that if the list of 150 persons was compiled in compliance with the then prevailing law of Maryland, it necessarily follows that a Grand Jury selected from that panel was unconstitutionally chosen. The evidence is clear, however, that in compiling this list no person was excluded because he did not believe in the existence of God. Judge Dorsey, called by the appellant, testified, and the record discloses no evidence to the contrary, that, in selecting the 150 persons, a question with respect to belief 'in a Supreme Being' and 'in moral accountability for [a person's] conduct' was 'never asked of anyone.' In answer to a question, 'Did you have reference to it in your picking of these names?', he answered, 'Since I have been judge, I have never known of anyone who's name was suggested for the jury, being a non-believer, nor has it ever been

mentioned so-far-as I can recall.' On cross-examination he was asked, 'Is there any form that a person fills out or signs or anything or taken by any person to be eligible to get on the list of 150 names?' He replied, 'No, sir, there is no form as-far-as I can recall. It has never been asked whether or not they believe in God, when the name was placed on the list of 150.' A person was included in the list 'without their knowing it.' It appears obvious that the first Grand Jury was discharged because an oath reflecting a belief in a Supreme Being had actually been administered to its members before they commenced their duties and not because the panel from which it was selected was unconstitutionally compiled. The 'strong presumption' stated in *Schowgurow* that prospective jurors were questioned as to their belief in God, was rebutted by direct evidence in the instant case. In reiterating *Schowgurow* in *State* v. *Madison, supra,* the Court said, page 273:

> '* * * *once it is established that the method of the grand jury's selection is unconstitutional,* any accused indicted by such a jury has the right to have the indictment dismissed.' (emphasis supplied)

The record is clear here that the indicting Grand Jury's selection with regard to the principles enunciated in *Schowgurow* was constitutional, and we so hold."

3. Part II of petitioner's petition for a writ of certiorari in the Court of Appeals of Maryland to review the foregoing decision of the Court of Special Appeals of Maryland was as follows:

> "The writ should be issued in this case because the Special Court has disregarded the rulings of this Court in *Schowgurow* v. *State,* 240 Md. 121, 213 A.2d 475 (1965); and *Madison* v. *State,* 240 Md. 265, 213 A.2d 880 (1965). This it did by permitting a grand jury to be chosen from a panel selected prior to the *Schowgurow* decision, at a time when those connected with the administration of this State's judicial machinery believed that anyone not professing a belief in a Su-

preme Being was ineligible to serve on a Maryland jury. It was therefore the duty of such persons, including the Circuit Judge for St. Mary's County, to exclude from the panel anyone not professing a belief in a Supreme Being, that is, anyone who was either an agnostic or an atheist. This Court has stated that it is to be presumed that such duty was in fact carried out.

> 'Because of the requirement of the Maryland Constitution, it has been the duty of nisi prius judges to make belief in God a condition to serve as a juror. There is a strong presumption that judges and court clerks, like other public officers, properly perform their duties.' Schowgurow v. State, 240 Md. 121, 126, 213 A.2d 475, 479 (1965).

"This 'strong presumption' that the Circuit judge for St. Mary's County 'properly performed' his duty was not overcome by the Delphic testimony of Judge Dorsey relied on by the State and by the Special Court.

> 'Q. And now, at the time you selected the panel in 1965, were you of the belief that no one was eligible to serve as juror unless he believed in a supreme being and unless he believed in moral accountability for his conduct? A. Naturally, that being the State Constitution at the time I was of that belief, but in selecting the 150 names, that question was never asked of anyone.
>
> 'Q. Did you have reference to it in your picking of these names? A. Since I have been judge, I have never known of anyone who's [sic] name was suggested for the jury, being a non-believer, nor has it ever been mentioned so-far-as I can recall.' (T. 25)

"If any conclusion can be drawn from Judge Dorsey's testimony, it would be that the entire jury panel selection procedure was carried out on the assumption that non-believers were to be excluded. This is no doubt why no non-believer's name was ever 'suggested for the jury' as far as the judge could recall.

"It is most regrettable that the circuit judge, who, in the aftermath of the *Schowgurow* decision, dis-

charged the grand jury and petit jury which he had impaneled and to which he had administered the oath required by the Maryland Constitution, did not also discharge the remaining members of the panel from which these two juries had been selected, and then selected a new panel of 150 prospects. However, he did not do so, with the result that your petitioner was indicted by a post-*Schowgurow* grand jury picked from a pre-*Schowgurow* panel.

"This issue was seasonably presented several months prior to trial by a motion to dismiss the indictment. This Court has afforded the benefit of the *Schowgurow* decision to defendants who did not raise the point until their case had reached the appellate stage. *Madison* v. *State*, supra. A fortiori, then, a defendant such as petitioner, who raised the issue via pre-trial motion, is entitled to assert the point it decided."

4. The opinion of the Court of Appeals of Maryland (Appendix, *infra*, pp. 2a-4a) dealt with this issue as follows:

"Following this affirmance a petition for the writ of certiorari was filed in this Court setting forth grounds hereinafter specified in detail and it was ordered on the 16th day of November, 1967, that the writ should issue and that the case be transferred to the regular docket as No. 323—September Term, 1967.

"In his petition, the appellant raises the following issues:

"I

"The writ should be issued so that this Court may review that aspect of the Special Court's decision which brushed aside petitioner's showing that the indicting grand jury was not selected in the manner prescribed by the statutes of this State.

"II

"The writ should be issued in this case because the Special Court has disregarded the ruling of this Court

in *Schowgurow* v. *State*, 240 Md. 121, 213 A. 2d 475 (1965); and *Madison* v. *State*, 240 Md. 265, 213 A. 2d 880 (1965).

* * * * *

"THE MOTION TO DISMISS THE INDICTMENT

"Appellant's issues I and II were raised in the Circuit Court by a motion to dismiss the indictment, which motion was overruled, after hearing and before trial on a not guilty plea pursuant to Maryland Rule 725. They were fully and adequately dealt with by the Court of Special Appeals which found no error in the denial of the motion to dismiss in which ruling we concur for the reasons stated by that Court. 2 Md. App. 5-16, 233 A. 2d, 346-352. That Court neither brushed aside the contentions of the appellant nor disregarded the rulings of this Court."

REASONS FOR GRANTING THE WRIT

Inasmuch as the first grand jury was discharged by order of the Circuit Judges because it had been selected in the same manner as that in the *Schowgurow* case (240 Md. 121, 213 A. 2d 475), and since that decision dismissed the indictment there involved because jury selection pursuant to the requirements of Article 36 of the Maryland Declaration of Rights (*supra*, pp. 3-4) involved a violation of the Fourteenth Amendment, it would seem obvious that a second grand jury drawn from the same infected panel had likewise been constituted in violation of the Fourteenth Amendment. But before elaborating this proposition, it may be appropriate to say a few words concerning this Court's jurisdiction.

First. Inasmuch as the Court of Special Appeals dealt with petitioner's claim as one that involved a claim of Federal right, citing the Fourteenth Amendment (*supra*, pp. 8-10), and the Court of Appeals then specifically approved the intermediate court's denial of the claimed Fed-

eral right (*supra*, p. 13), it is plain that the Federal question was properly raised and clearly determined below.

Even without that, petitioner's State petition for certiorari adequately presented the Federal question notwithstanding its failure to invoke the Fourteenth Amendment *eo nomine*. For that petition in effect incorporated the Fourteenth Amendment by reference, by relying on the two decisions of the Maryland Court of Appeals in *Schowgurow* v. *State*, 240 Md. 121, 213 A. 2d 475, and *State* v. *Madison*, 240 Md. 265, 213 A. 2d 880, in both of which that tribunal had applied the Fourteenth Amendment to invalidate indictments returned by grand juries selected pursuant to the Maryland Constitution as written.

Consequently here, as in *Bryant* v. *Zimmerman*, 278 U.S. 63—a case jurisdictionally very similar to this one—the Federal question has been asserted and determined so as to enable this Court to review the decision below. As was there said (p. 67):

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

Second. On the merits, the decisive fact is this case is the formal order of the Circuit Judges reciting "that the Grand Jury empaneled on September 20, 1965 is illegally constituted because the procedure used in the selection and qualifying of said Grand Jury was substantially the same as found to be illegal in the above mentioned Schowgurow case." From this it necessarily and indeed inescapably follows that the second grand jury, which indicted petitioner, and which was drawn from the remaining members

of the identical infected panel that had been chosen on September 2, was likewise illegally constituted in violation of the Fourteenth Amendment.

Insofar as Judge Dorsey's somewhat equivocal testimony (*supra*, p. 7) was inconsistent with the formal order previously signed by himself and six other members of the Circuit Court, an order that he never mentioned in his testimony, it is entitled to no more weight than that of jury commissioners who undertake a testimonial rebuttal of discrimination statistically demonstrated. *Cassell* v. *Texas*, 339 U.S. 282, 286-287; *Hernandez* v. *Texas*, 347 U.S. 475, 481-482; *Reece* v. *Georgia*, 350 U.S. 85, 88; *Eubanks* v. *Louisiana*, 356 U.S. 584, 587. Furthermore, Judge Dorsey's testimony ran counter to what the highest court of Maryland had said in the *Schowgurow* case (240 Md. at 126, 213 A. 2d at 479):

> "Moreover, this Court takes judicial notice of the fact that it is and for many years has been a widespread practice in this State, not only for grand and petit jurors to be questioned as to their belief in God as part of their oath, but also for prospective jurors to be so questioned, orally or in written interrogations, before their names are placed on the jury lists, and that any person who does not state his belief in God is excluded. Absent an adjudication by this Court or the Supreme Court of the United States that this practice is unconstitutional, the judges, clerks and other court officials who so made belief in God a requisite to jury service were properly performing their duties under our Constitution and the decision of this Court."

It is also to be noted that St. Mary's County is essentially rural, with perhaps the largest concentration of population at and around the Naval Air Station at Patuxent. The 1960 census listed the total population of the county as 38915, and that of Leonardtown, the county seat, as 1208. In this environment jurors are drawn on the basis of the trial judge's personal knowledge of the eligibles, as indeed

the then resident judge testified a few years back.* It is simply not conceivable that any non-believer could ever have been selected as a juror in St. Mary's County prior to the date of the *Schowgurow* case, October 11, 1965—and of course, where a Federal right to the selection of a valid grand jury is claimed, this Court has consistently made an independent reexamination of the facts underlying such a claim. E.g., *Cassell* v. *Texas,* 339 U.S. 282, 283 note 1, and cases there cited.

Third. Petitioner was not required to prove himself a non-believer in order to assert the invalidity under the Fourteenth Amendment of the believer requirement in

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* See *King* v. *State,* 190 Md. 361, 367, 58 A. 2d 663, 665:

> "Chief Judge William M. Loker, who drew the jury in this case, testified that he did not check both the poll books and the assessment records on these particular occasions because he never thought that it was necessary to check both. When asked the question: 'On what date did you consult the poll books this time?' he answered: 'This time? I said I did not do it this time.' He said, however, that in selecting the jury list: 'I make inquiry about men of the county, and try to find out, the best I can, whether they are taxpayers, and if they are taxpayers or voters, find out if they are over 25 or under 70; and most important, what I try to find out about those people is their character, how they stand in the community, their reputation. When I get those names, I always inquired very particularly, unless I know myself, I look at the particular thing, then I check back,—in many instances I reckon some of them I may have forgotten,—but I check back, not more in the list of jurors than I do the assessment records, because the assessment record gives me the amount of the assessment, so that I can know how large it is, what kind of man he is,—that is to say, a frugal, industrious man, probably has a larger assessment. Some will give the name of two or three brothers of the same family, and I look back in the assessment record to see which is the same, or ought to be the same, as the jury list, sometimes it is not; and I get it.'"

The Judge William M. Loker mentioned, now retired, is the father of the present petitioner.

Article 36 of the Maryland Declaration of Rights (*supra*, pp. 3-4). In *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, this Court held that the systematic exclusion from the jury lists of those who worked for a daily wage invalidated a verdict returned by a trial jury that in fact contained "at least five members of the laboring class" (p. 225), this at the instance of a salesman (*ibid.*), who obviously was not in the blue collar category. Similarly, in *Ballard* v. *United States*, 329 U.S. 187, the exclusion of women from the jury panel resulted in the reversal of the convictions of both a woman and her husband. Both these authorities were primarily relied on by the Maryland Court of Appeals in applying the rule of the *Schowgurow* case—and Schowgurow was a Buddhist—to an individual who believed in the existence of God. *State* v. *Madison*, 240 Md. 265, 271-273, 213 A. 2d 880, 884-885.

Finally it is clear that, where selection of the indicting grand jury has not conformed to the requirements of the Constitution of the United States, it is not necessary for the convicted person to show specific prejudice. That point was squarely decided in *Cassell* v. *Texas*, 339 U.S. 282, over the articulated dissent of Mr. Justice Jackson, 339 U.S. at 298-305—and the Maryland Court of Appeals in *State* v. *Madison, supra*, also relied on *Cassell* v. *Texas;* see 240 Md. at 272, 213 A. 2d at 885.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006,
Counsel for the Petitioner.

DECEMBER 1968.

APPENDIX

APPENDIX

Opinions Below

1. The opinion of the Special Court of Appeals of Maryland is reported at 2 Md. App. 1 and 233 A. 2d 342; the portions thereof that consider the Federal question (2 Md. App. at 6-8, 233 A. 2d at 346-347) are set forth above, pp. 00-00. The dissenting opinion of Thompson, J. (2d Md. App. at 38-39, 233 A. 2d at 364-365) does not consider the Federal question.

2. The opinion of the Court of Appeals of Maryland is reported at 245 A. 2d 814, and is as follows (less the dissenting opinion of Barnes, J., at pp. 821-830, which does not consider the Federal question):

IN THE COURT OF APPEALS OF MARYLAND

No. 323

September Term, 1967

WILLIAM M. LOKER, JR.

v.

STATE OF MARYLAND

Hammond, C. J.
Barnes
Singley
Smith
Keating, Thomas J., Jr.* (specially assigned)
Rutledge, Irvine H. (specially assigned)
Clapp, Robert E., Jr. (specially assigned),

JJ.

Opinion by Clapp, J.
Barnes, J. dissents.

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* Keating, J., participated in the hearing of the case and in the conference in regard to its decision, but did not take part in the adoption of the opinion since he had retired prior to the filing of the opinion.

Filed: September 27, 1968

This case is here on writ of certiorari to the Court of Special Appeals issued pursuant to Sec. 21A of Art. 5 of the Annotated Code of Maryland (1968 Repl. Vol.). On May 24, 1966, the appellant was convicted by a jury in the Circuit Court for St. Mary's County on the second and fourth counts of an indictment, which counts, respectively, charged a violation of Art. 27, Sec. 129 of the Code (embezzlement by a clerk, servant, or agent or officer); and the commission of the crime of grand larceny. He was sentenced to imprisonment for a term of five (5) years for each offense, the sentences to run concurrently, and an appeal was noted to this Court and received Docket No. 380—September Term, 1966. After the brief for the appellant had been here filed, the case was transferred to the then newly created Court of Special Appeals which affirmed the judgment. *Loker* v. *State,* 2 Md. App. 1, 233 A. 2d 342.

Following this affirmance a petition for the writ of certiorari was filed in this Court setting forth grounds hereinafter specified in detail and it was ordered on the 16th day of November, 1967, that the writ should issue and that the case be transferred to the regular docket as No. 323—September Term, 1967.

In his petition, the appellant raises the following issues:

I

The writ should be issued so that this Court may review that aspect of the Special Court's decision which brushed aside petitioner's showing that the indicting grand jury was not selected in the manner prescribed by the statutes of this State.

II

The writ should be issued in this case because the Special Court has disregarded the ruling of this Court in *Schrowgurow* v. *State,* 240 Md. 121, 213 A. 2d 475 (1965); and *Madison* v. *State,* 240 Md. 265, 213 A. 2d 880 (1965).

III

The writ should be issued to enable this Court to review the ruling of the Special Court to the effect that a public official who embezzles public funds can be prosecuted under either the general embezzlement statute or the statute condemning embezzlement by a public official.

IV

The writ should be issued so that this Court can review the ruling of the Special Court to the effect that a public official who removes public funds from a safe in *his* possession commits larceny rather than embezzlement.

V

The writ should be issued so that this Court can review the decision of the Special Court that the so-called "less cash" transactions constituted a crime against the Town, and not against the two banks involved.

VI

The writ should be issued so that this Court can review the conclusion of the Special Court that the State met its burden, as to the larceny conviction, of adducing circumstantial evidence which, "taken together, must be inconsistent with, or such as to exclude, every reasonable hypothesis or theory of innocence."

THE MOTION TO DISMISS THE INDICTMENT

Appellant's issues I and II were raised in the Circuit Court by a motion to dismiss the indictment, which motion was overruled, after hearing and before trial on a not guilty plea pursuant to Maryland Rule 725. They were fully and adequately dealt with by the Court of Special Appeals which found no error in the denial of the motion to dismiss in which ruling we concur for the reasons stated by that Court. 2 Md. App. 5-16, 233 A. 2d, 346-352. That

Court neither brushed aside the contentions of the appellant nor disregarded the rulings of this Court.

The Facts

In view of the careful and detailed summary of the facts upon which this prosecution is based, found in the opinion of the Court of Special Appeals, 2 Md. App. 16-20, 233 A. 2d, 352-354, we deem it unnecessary to repeat them here and shall proceed to a discussion of the remaining issues raised by the petition for the writ of certiorari.

The Conviction of Embezzlement

(a) The statutes involved.

The appellant contends under his issue III that he, as treasurer of the Town of Leonardtown, was a public officer within the meaning of Sec. 138 of Art. 27 of the Code (embezzlement by elected or appointed public officers required by law to account) and, therefore, could not be prosecuted and convicted under Sec. 129 of Art. 27 proscribing embezzlement by cashiers, servants, agents, officers or clerks to any body corporate. The Court of Special Appeals held that the appellant was a public officer within the meaning of Sec. 138 but that he could, also, be tried and convicted under Sec. 129. We agree with the affirmance of the conviction under Sec. 129 but not for the reasons stated by the Court of Special Appeals.

For the purposes of this opinion, we accept, without deciding, the assumption of the parties and of the Court of Special Appeals that the appellant was a public officer within the meaning of Sec. 138 and proceed to a discussion of his contention that public officers may only be prosecuted under that section and not under Sec. 129.

An examination of the legislative and judicial history of the two sections demonstrates the fallacy of this contention. Sec. 129 was first adopted by Chapter 162 of the Acts of 1820 and punished embezzlement by a "cashier,

servant, agent or clerk ..... to any person or persons whosoever, or to any body corporate or politic." Here, it should be noted that officers of neither public nor private corporations were subject to prosecution thereunder.

Sec. 138 relating to embezzlement by the described public officers was first enacted by Chapter 196 of the Acts of 1854 (erroneously designated in the 1967 Replacement Volume of the 1957 Code as Ch. 196 of the Acts of 1884). Obviously, at that time there was neither conflict nor inconsistency between the two Acts, because the Act of 1820 had no application to public officers or bodies politic as distinguished from cashiers, servants, agents or clerks.

Both Acts were codified as Secs. 49 and 50 of Art. 30 of the Public General Laws of 1860 in which the phrase in the 1820 Act, "any body corporate or politic" appears as "any body corporate". This Code was adopted by the General Assembly by Chapter 1 of the Acts of 1860 in lieu of and as a substitute for all the Public General Laws and the Public Local Laws, heretofore passed by the Legislature of Maryland. Appellant, therefore, argues that this change in phraseology was intended to eliminate bodies politic from coverage under Sec. 129.

This contention is answered by the decision of our predecessors in *State* v. *Denton,* 74 Md. 517, 22 A. 305 and *Denton* v. *State,* 77 Md. 527, 26 A. 1022, holding that embezzlement by a clerk to the county commissioners is punishable under that section. In the former it was contended, just as here, that the appellant was a public officer, not subject to prosecution under Sec. 75 (now Sec. 129) although it was not conceded that he was subject to prosecution under Sec. 80 (now Sec. 138). In holding that he was not a public officer, but, as clerk, was subject to prosecution under present Sec. 129, the Court said, at page 521 of 74 Md., "The fact that he is clerk to a public corporation does not put him outside of Sec. 75 (now Sec. 129), because that section is broad enough to embrace public as well as private corporations."

It should be noted that at the time of that decision in 1891, Sec. 129 did not include officers as distinguished from cashiers, servants, agents or clerks. Thus the reason is apparent why the State Treasurer, indicted under Sec. 138, could not be charged under Section 129. See *State* v. *Archer*, 73 Md. 44, 20 A. 172 (1890).

With this background in mind, we turn to a consideration of Chapter 329 of the Acts of 1914. That Act amended Sec. 129 to include officers of any body corporate among those within its purview. In view of this Court's decision in *Denton*, it is apparent that officers of public as well as private corporations were intended by the Legislature to be included in the section.

There is no dispute, nor could there be in view of Sec. 94 of Art. 19 of the Code of Public Local Laws (Flack, 1930) that the Commissioners of Leonardtown are a public body corporate. We, therefore, hold that the appellant, even though assumed to be a public officer was subject to prosecution under Sec. 129. It is unnecessary to decide whether he, also, could be prosecuted under Sec. 138.

(b) The alleged variance.

As his fifth issue under the embezzlement conviction, the appellant contends that there is a fatal variance between the allegations of the second count of the indictment and the proof. This second count alleges embezzlement of United States Currency, "the property of the said Commissioners of Leonardtown."

There was evidence that the appellant, from time to time, received checks on account of the Town for taxes, water rents, etc., that these checks were restrictively endorsed for deposit only to the account of the Town and listed on a deposit slip for deposit in the Town's accounts. On the deposit slip the appellant designated the total amount of the checks with the notation "less cash" and upon presenting the deposit to the bank received, in cash the amount so

designated by him. Only the difference between the total amount of the checks and the cash received by him was credited to the Town's accounts. There was testimony that in some instances, the appellant asked a teller receiving deposits in this fashion to give him larger bills and said he was going to put them in the other bank. In fact, no deposits were made in the Town's other account. The appellant urges that the banks were obligated to credit the full amount represented by the checks to the accounts in the name of the town because of the restrictive endorsement of them for deposit only and that since this was not done, the cash given the appellant without authority was not the Town's money but the bank's money, the banks being liable to the Town for the full amount of the checks when they were collected. This argument is predicated upon the Code, Art. 11, Sec. 121 in effect at the time of these transactions providing that an endorsement of an item by a depositor "for deposit" was deemed a restrictive endorsement and indicated that the endorsee bank was an agent for collection and not the owner of them.

The Court of Special Appeals considered and rejected this argument and we agree with its decision and the reasons therefor.

We point out further that there is no specific requirement in Sec. 129 of Art. 27 that ownership of the money embezzled be either alleged or proved, the statute only requiring that the money, "shall be delivered to or received, or taken into possession by him for or in the name or on account of his ..... employer." It was judicially determined that the ownership of such money must be alleged in the indictment in *State* v. *Tracey*, 73 Md. 447, 21 A. 366, because the statute makes its violation larceny and the common law crime of larceny required an allegation of ownership of the stolen property. The Court of Special Appeals quite rightly pointed out that in indictments for larceny an allegation of the ownership of stolen goods may be supported by proof of any legal interest or special prop-

erty in the goods, *Richardson* v. *State,* 221 Md. 85, 156 A. 2d., 436, and we feel that no more stringent requirement with respect to embezzlement should be applied than to a claim of variance with respect to a charge of larceny.

Moreover, we point out that, even accepting the contention of the appellant that the money in the cash drawer of the teller, before delivery to the appellant, belonged to the bank, it is clear that this teller when such money was delivered by him to the appellant intended to pass title thereto to the Town. It can hardly be contended that this teller intended to deliver this cash for appellant's personal use. A secret intent on the part of the appellant to appropriate this money to his own use can hardly be used by the appellant as an argument to defeat a charge of embezzlement of the Town's money. Compare *Territory* v. *Hale,* 13 N.M. 181, 81 Pac. 583, 13 Ann. Cas. 551, a case dealing with embezzlement under the New Mexico statute. It is not in point on the facts but does deal with the ownership of monies improperly drawn from the general account of a county. It was there stated at page 190 as follows:

> "But when a check is drawn there is a segregation of that much money from the general funds of the bank which becomes the property of the depositor. This may be placed to the credit of the payee of the check, or it may be handed him in money, or otherwise disposed of as the parties may elect. *But for a space of time, however, the money of the depositor is being dealt with* * * * *". (Emphasis supplied)

So, also, here when the teller pursuant to the "less cash" deposit slip, segregated funds belonging to the banks and delivered such funds to the appellant, title thereto was in the Town of Leonardtown for a period of time however short. Cf., also, *State* v. *Lockie,* 43 Idaho 580, 253 Pac. 618. Reliance upon the intricacies of civil liability as between the Town of Leonardtown and the banks has little relevance to the criminal charge here involved and the

question of guilt or innocence is not dependent upon the many issues that can be raised in connection with the deposit of commercial paper, title thereto and the right to charge back credit given. For a discussion of these many issues that we find not relevant to a criminal trial for embezzlement see 10 Am Jur 2d, *Banks,* para. 402-413 inclusive. Civil liability as between the Town and the banks is an issue completely collateral to the criminal charge of embezzlement.

We hold, therefore, as did the Court of Special Appeals, "that there was sufficient evidence for the jury to find that the Town was the owner or had a legal interest or special property in the money and that therefore there was no fatal variance between the allegata and the probata."

THE CONVICTION OF LARCENY

(a) The sufficiency of the evidence.

The sixth issue of the appellant contends that the State failed to meet its burden as to the larceny conviction of adducing circumstantial evidence which, taken together, must be inconsistent with, or such as to exclude, every reasonable hypothesis or theory of innocence. This issue was fully discussed by the Court of Special Appeals which found no error in the denial of appellant's Motion for Judgment of Acquittal overruled by the Circuit Court. We concur in the holding and reasons of the Court of Special Appeals found in 2 Md. App. pp. 25-29, 233 A. 2d, 357-359.

(b) The possession of the funds allegedly stolen.

Appellant's fourth issue claims that the monies allegedly stolen, were taken from a safe in his possession and therefore, the crime committed, if any, was embezzlement rather than larceny. This issue presents the dilemma that Judge Prescott in his concurring opinion, prophesied would result from the decision of this Court in *Nolan* v. *State,* 213

Md. 298, 131 A. 2d 851, and discussed in 18 Md. L. R. 235. The Court of Special Appeals after an able discussion of the authorities decided this issue against the appellant and we agree with the holding of that Court but not with its reasons.

The entire argument of the appellant rests upon his contention that "the common law of larceny already is burdened with a number of aberrant doctrines; it does not need another. Specifically, it can do without a doctrine that theft by a corporate or public officer of funds to which he alone has access and which are received by virtue of his office is larceny."

He further argues, "that the facts in this case establish that the receptacle involved, the Town's safe, was itself in his possession as opposed to that of the Town. Since this was true, the funds, when placed in the safe by his secretaries or by him, remained in his constructive possession, so that any subsequent abstraction by him from the safe would be embezzlement, and not larceny."

The entire argument of the appellant is predicated upon a false premise, that is, the exclusive possession in himself of the safe and the funds therein. The record, however, is to the contrary. The safe, itself, at least after the formation of appellant's first law partnership was kept in the office of his partner's secretary who did most of the Town's collections and bookkeeping and was not in the office of the appellant. She, in fact, kept the Town's receipt books on her desk and each morning opened the safe.

Following the formation of appellant's second law partnership the safe was kept not in the office of the appellant but in the room just off the partnership reception room where there was a secretary. The office manager of the partnership sometimes handled Town business and on Saturdays when, apparently, only some of the partners and secretaries would be present, collected town taxes and put them in the desk drawer until the necessary

bookkeeping entries could be made by a secretary of the firm. All secretaries of the firm and all partners had access to this safe and the firm's funds were also kept therein.

Moreover, apparently as the business of the Town increased, it hired several employees to do the Town's work and, although they worked in the offices of appellant's law partnership, they were not on its payroll.

We agree that, "two elements necessary to constitute the crime of larceny in addition to the felonious intent are a physical taking and asportation of the thing taken from the actual or constructive possession of the owner." *Brown* v. *State,* 236 Md. 505, 513; 204 A. 2d, 532, but we find no violations of this rule in the decision of the Court of Special Appeals in this case. Clearly, of course, under our decision in *Nolan* v. *State, supra,* the defendant cannot be guilty of the larceny of money in his actual possession but the evidence in this case discloses that little if any of the money here involved ever came into the actual possession of the defendant except by the commission of the crime charged. The collection of Town funds by an employee paid by the Town or by the law office secretaries authorized to make such collections and placed in a receptacle owned by the Town without, in any way, passing first through the hands of the appellant, gave actual possession to the Town and the fact that the receptacle was located in the office of a partnership used also as the offices of the Town would be insufficient to give actual possession to the appellant. He answers this point by arguing that "the funds, when placed in the safe by his secretaries or by him, remained in his constructive possession, so that any subsequent abstraction by him, from the safe would be embezzlement and not larceny" but he cites no authority for the proposition that an alleged larcenist under circumstances such as this can rely on the doctrine of constructive possession so as to claim that no trespass was com-

mitted by him when he later abstracted funds belonging to his employer from a receptacle owned by the employer.

In *Nolan* our predecessors adopted certain of the English cases maintaining the various distinctions between embezzlement and larceny. In none of them is there any authority for extending the established doctrine of constructive possession to any alleged wrongdoer not in actual possession and the case of *Reg.* v. *Wright,* Dears & B. Crown Cas. 431, 441, 442, cited with approval therein shows that the accused must have actual possession before he can successfully maintain that his crime was embezzlement rather than larceny. In that case, the safe, furnished by the employer, was located in the home of the defendant used as the branch office of a bank whose main office was in another town. He took money of the bank from the safe after it had been placed therein and was convicted of larceny from the constructive possession of his employer, Judge Crowder, one of the concurring judges saying, "The fact that the prisoner had the entire control over the premises makes no difference. If he took the money from the safe for the purposes of the bank, he did so as a part of his duty; but if he took it for his own purposes he was guilty of larceny."

The reliance by him upon *Morgan* v. *Commonwealth,* 47 S.W. 2d 543 (Ky. 1932) is misplaced. There the Court found exclusive and actual possession of the receptacle and the funds stolen by the defendant to have been always in the defendant, the Court stating at page 544 as follows:

> "Although the company had the right to demand the funds of him at any time, and although the company could potentially enter the safe by opening the sealed envelope and apprising itself of the combination, yet it was not intended by the company that it should interfere with appellant's control and possession of the contents of this safe and the funds of the company unless and until some condition which had not occurred in this case at the time of the conversion had

> come to pass. It is quite manifest that the possession of these funds at the time they were converted was in the appellant and that it had not yet become that of the Western Union. This being true, the conversion amounted to an embezzlement and not larceny."

The factual situation presented in *Morgan* is not presented by the record here.

The trial court as an advisory instruction to the jury stated that a taking from the possession of the Town of Leonardtown was a necessary element of the crime of larceny charged under count four of the indictment. There was evidence to support this instruction and it was a correct statement of the law. There was no request by the appellant that the term "possession" be further defined.

For these reasons we hold that the trial court properly denied appellant's motion for judgment of acquittal as to the larceny count and that the trial court correctly advised the jury as to the law of larceny applicable to the facts presented in evidence.

JUDGMENTS AFFIRMED.